IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CRIMINAL APPEAL NO.166 OF 1999

Eliyas Kasammiya Phansopkar,
Age about 32 years, residing at
Juna Phansop Mohalla, Ratnagiri,
District-Ratnagiri. .. Appellant.
(Orig.Accused)

v/s.

The State of Maharashtra .. Respondent.
(Orig.Complainant)

Mr.C.K.Pendse i/by Ms.Swati Sawant for appellant.

Ms.Usha Kejariwal, Additional Public Prosecutor for the State.

CORAM : R.M. LODHA AND
R.S. MOHITE, JJ.

DATED : 24th February, 2005

ORAL JUDGMENT (Per R.M.Lodha, J.)

The Additional Sessions Judge, Ratnagiri by his judgment dated 24th February, 1999 convicted the appellant of the offence punishable under section 302 IPC and sentenced him to suffer life imprisonment and to pay a fine of Rs.1000/- and in default to suffer rigorous imprisonment for a period of three months.

2. By means of this criminal appeal the accused-appellant challenges the legality and correctness of the aforesaid judgment.

3. The prosecution case briefly may be stated thus-

Eliyas Kasammiya Phansopkar (the accused) was married to Samina. That marriage took place somewhere in the year 1988. Samina and the accused were residing at village Phansop alongwith the family members of the accused. The accused had illicit relations with one girl Rehana and because of that there used to be frequent quarrels between them. Samina informed her mother about the illicit relationship between the accused and Rehana. On 1.12.1995 at about 08.00 p.m. there was quarrel between the accused and Samina on account of chickens. The accused thereafter strangulated Samina. However to cover up the crime, the accused and his brother took Samina to Dr.Muneer Mhaskar (PW4) who declared her dead. Samina's mother Shamshad (PW1) came to know from her cousin sister at Kolhapur that Samina was not well and that she and other members of the family should immediately go to Ratnagiri. Samina's mother and the family members then left for Ratnagiri (Phansop) and reached there in dawn on 1.12.95. After reaching the residence of the accused, Shamshad made enquiry about the death of Samina. She was told that Samina had a fall in the bathroom that resulted in injury to her neck and she succumbed to death while she was

being taken to the Doctor. Since Shamshad was told that there was no custom for presence of the family members of a dead female during burial, she and other members left for Kolhapur on that day. Samina was buried on 2.12.95. After few days, Police Station, Ratnagiri received anonymous letter wherein it was stated that Samina was murdered. The Ratnagiri police called Shamshad from Kolhapur. On 14.12.95, Shamshad went to Police Station, Ratnagiri where the accused was also present. On the basis of the information given by Shamshad, first information report was lodged. The Police Inspector Kalyanrao Baburao More (PW6) then started investigation. He inspected the house of the accused and prepared panchanama. The place of the tomb of the deceased was also inspected. The statements of the witnesses were recorded. The body of deceased Samina was exhumed on 15.12.95 and postmortem of the dead body of Samina was got conducted. Viscera of stomach intestine with parts of lever spleen kidney, heart, lung, liquified brain and pubic hair were collected and sent for chemical analysis. On receipt of C.A. report, it was found that Samina died due to asphyxia because of throttling. The investigation officer submitted the chargesheet and the accused was committed to the Court of Sessions for trial.

4. There is no direct evidence and the prosecution

sought to bring home the guilt of the accused by proving the network of circumstances. In this regard, the prosecution examined Shamshad (PW1), Dilshad (PW2), Mahendra Madhukar Salvi (PW3), Dr.Munir Suphi Mhaskar (PW4), Dr.Pravin Mahadevrao Shevale (PW5) and Kalyanrao Baburao More (PW6).

5. Before we advert to the circumstances relied upon by the prosecution, we would like to deal with the prosecution evidence.

6. PW1 is the mother of deceased Samina. According to her, marriage of Samina and accused took place about 7 years prior to the date of incident. Samina was residing with the accused alongwith his parents, his brother and brother's wife. After one and half years of their marriage and when Samina was pregnant, she came to know that the accused was having illicit relations with Rehana. Rehana too was pregnant. Samina told her that the accused was beating her. On the insistence of the accused, Rehana was taken to the hospital for abortion alongwith Samina and abortion was carried out. She deposed that because of the illicit relations between the accused and Rehana, her daughter Samina was illtreated by the accused. On 1.12.95, she came to know at Kolhapur that her daughter Samina was not well and that they all should go to Ratnagiri. This

information was received by her from her cousin sister. She alongwith other family members came to Phansop and found that Samina was already dead. She made enquiry about death of Samina. The family members of the accused informed that Samina had a fall in the bath room causing injury to the vain in the neck and on way to hospital, she died. She was not allowed to attend the burial because of the custom in the family of the accused and she alongwith other family members returned back. On 14.12.95, she came to Ratnagiri as required by Ratnagiri Police Station and there on her information, the FIR was lodged. In the cross-examination she admitted that she saw the dead body of Samina; her face was uncovered and the remaining body was covered. She confirmed that the dead body of Samina was as per custom of Muslim religion. The omission was elicited from her cross-examination that in the report made by her there was no allegation of beating and illtreatment to Samina by the accused.

7. PW2 is next door neighbour of the accused. The brick wall separates their house. She deposed that the accused had illicit relation with Rehana. Rehana was pregnant on account of said illicit relation and her abortion was carried out. She stated that there used to be frequent quarrels

between the accused and the deceased. On 1.12.95 at about 08.00 p.m. there was quarrel between the accused and the deceased on account of chickens. She intervened in the said quarrel and then had gone to the house of Jainuddin Mulla. At about 09.00 p.m. there were cries that Samina succumbed to death. According to her, in the evening of 14.12.95, the accused came to her house and confessed that he had caused death of Samina by pressing her neck. In the cross-examination she admitted that she did not inform the police about the confession. Though she gave an explanation that it was on account of death of her father-in-law and she was observing the custom of not going out of the residence. The omission was also elicited in the cross-examination about her intervention in the quarrel between Samina and the accused on 1.12.95 at about 08.00 p.m.

8. PW3 is witness to the panchanama of the house of accused as well as the tomb.

9. PW4 is the medical practitioner practising at Ratnagiri. She deposed that on 1.12.95, the accused and one Sahid brought one young lady. She examined her pulse, her breathing and pupils and found that the lady was already dead. She informed the accused to take the dead body to the Civil Hospital,

Ratnagiri as it was medico legal case and she prepared document Exhibit 20.

10. PW5 at the relevant time was Medical Officer at Primary Health Centre, Pawas. According to him, on 15.12.95, he was called by the police at village Phansop. In his presence and the presence of Tahsildar, the dead body of one female was exhumed. The inquest panchanama of the body was prepared and then the dead body was handed over to him and Dr.Lotlikar for postmortem. Decomposition of the body was in process. Rigor mortis was present all over the body. Decomposition of skin on the vital organs was in process and so also for the fatigue tissues and muscles. No external injury was noticed by him. On palpation of neck, the depressed fracture of hyoid bone and thyroid cartilege was found. The injury was ante-mortem. He collected viscera of stomach intestine with parts of liver, spleen, kidney, heart, lung and liquified brain and so also pubic hair and sent the viscera for chemical analysis. Upon receipt of C.A.report vide certificate (Exhibit 22), he opined that cause of death of the lady was due to asphyxia because of throttling. He said that the depressed fracture of hoyid bone and thyroid cartilage is possible by pressing the neck and this injury is sufficient in the ordinary course of nature to cause death. He

denied that the said injury was possible by hanging a person by rope or scarf resulting into death. He denied that in a fall with force fracture of hyoid bone and thyroid cartilage was possible. He also denied that in a suicide by strangulation, there was possibility of such fracture. He reiterated that the fracture of hyoid bone and thyroid cartilage was ante-mortem because there were no injuries seen by him on the neck. He asserted that at the time of postmortem, skin on the neck was present. He denied that the fracture of hyoid bone and thyroid cartilage was possible due to load of one ton soil for 15 days on the dead body.

11. PW6 is the investigating officer. He deposed about the information given by PW1 based on which FIR was registered. He arrested the accused on 14.12.95 and inspected the house of the accused and the place of tomb on that day. According to him on 15.12.95 in the presence of panchas, Tahsildar and the doctor, the dead body of Samina was exhumed. He deposed that the statements of various persons were recorded by him and filing of the chargesheet after receipt of C.A.report and opinion for cause of death obtained from PW5.

12. This in substance is the prosecution evidence. Now we advert to the circumstances relied upon by

the prosecution to prove the guilt of the accused. These circumstances are (one) motive (two) extra judicial confession (three) false information given about the death of the deceased (four) conduct of the accused and (five) last seen.

13. Before we deal with each of the aforesaid circumstances, we would like to observe that from the evidence of PW5, no doubt is left that Samina's death was homicidal. It is true that the postmortem of the body of Samina was conducted about two weeks after her death and that at that time, the decomposition of the body had already progressed but the evidence of PW5 rules out that the fracture of hyoid bone and thyroid cartilage was possible by a fall with force or suicide by strangulation or because the dead body was covered by load of one ton soil for 15 days. The fracture of hyoid bone and thyroid cartilage was ante-mortem and no injuries were seen by PW5 on the skin of the neck. Thus, the death of Samina is established to be homicidal.

14. The motive is sought to be established by the evidence of PW1 and PW2. Both of them stated that the accused had illicit relations with Rehana and there used to be quarrels between the accused and the deceased Samina. PW1 and PW2 have not stated any specific quarrel between the accused and the

deceased Samina on account of the relationship between the accused and Rehana. PW2 states of the quarrel between the accused and Samina on 1.12.95 at about 08.00 p.m. on account of chickens. However, her statement that she had intervened in the said quarrel is falsified as there is omission in this regard in her statement to the police. That any quarrel might have taken place between the accused and Samina on 1.12.95 on account of chickens could not have motivated the accused to commit the murder of his wife. The relationship between the accused and Rehana had been going on for many years. The motive, thus, sought to be established by the prosecution through the evidence of PW1 and PW2 is too weak to be accepted.

15. The evidence of PW2 with regard to extra judicial confession cannot be accepted for more than one reason. The extra-judicial confession is said to have been made by the accused to PW2 on 14.12.95. Was it a matter of coincidence that on the same day, first information report is lodged by PW1. Secondly and more importantly, there is material omission in this regard. PW2 has not stated in her police statement about the said confession. Thirdly, it is for the first time in the court during the deposition that PW2 stated about the extra-judicial confession. Her statement was recorded on 5.9.99.

That means that for more than three years, PW2 did not disclose to anybody about the confession said to have been made by the accused to her. We are afraid, the evidence regarding extra judicial confession suffers from inherent infirmities and cannot be accepted.

16. The third circumstance relied upon by the prosecution is regarding false information about the death of Samina said to have been given by the accused. PW1-the mother of the deceased says that when she reached the house of the accused early in the morning on 2.12.95, she made enquiries about the death of Samina. The family members of the accused informed her that Samina had a fall in the bathroom causing injury on the neck resulting into death on way to the hospital. In the entire deposition not a word is stated that the accused gave her information that Samina died due to fall in the bathroom. Any information falsely given by the family members of the accused cannot be put in the mouth of the accused. In the statement under section 313 Cr.P.C., nothing could be shown by the learned Additional Public Prosecutor that the accused gave information to PW1 or anyone else that Samina had a fall in the bathroom resulting into neck injury and her death. The evidence on record, thus, does not indicate that any false information was given by the

accused personally about the death of Samina. In view of this finding, the two judgments relied upon by the learned Additional Public Prosecutor in the case of Swapan Patra and ors. v/s. State of W.B., (1999)9 SCC 242 and Sahadevan alias Sagadevan v. State represented by Inspector of Police, Chennai, (2003)1 SCC 534, have no application.

17. Now we turn to the conduct of the accused. We do not find any incriminating aspect in this regard. The fact of the matter is that it was he who alongwith his brother took Samina to Dr. Mhaskar (PW4). PW4 on examination of her pulse, heart, breathing and pupils found that she was already dead. The document Exhibit 20 was not recovered from the accused but was produced by PW4 during the course of her examination. The perusal of Exhibit 20 leads us to believe that PW4 for her own safety got the document executed from the accused. The accused had not run away. Rather, the fact is that the dead body of Samina was not buried until PW1-mother of the deceased and other family members had arrived. As a matter of fact, PW1 had no suspicion regarding the death of her daughter for almost two weeks until she was called by the police on the basis of some anonymous letter. The record does not indicate any abnormal conduct on the part of the accused.

18. The last circumstance relied upon by the prosecution relates to last seen. PW2 deposed that on 1.12.95 at about 08.00 p.m. Samina and the accused had quarrel on account of chickens. Samina is said to have died thereafter. It is admitted case of the prosecution that the accused and his brother, brother's wife, parents were staying with him alongwith Samina. The fact that the accused and Samina were seen together in their house does not lead to a circumstance connecting the accused with the crime.

19. It is true that the accused has not given any explanation about the death of Samina but taking overall facts and circumstances of the case and the evidence that we have already discussed, we find that it would be unsafe to rely on this circumstance as an incriminating piece of evidence against the accused where the other circumstances relied upon by the prosecution have not been found to be safe by us. The evidence, thus, produced by the prosecution falls short of proving total creditworthiness and we are of the view that the accused is entitled to the benefit of doubt.

20. The appeal, accordingly, succeeds. The conviction of the accused under section 302 of IPC

by the Additional Sessions Judge, Ratnagiri vide judgment dated 24th February, 1999 is set aside. The accused be released forthwith, if not required in any other case.

(R.M. LODHA, J.)

(R.S. MOHITE, J.)